No. 88-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARTE-HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER HARTE-HANKS COMMUNICATIONS, INC.

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Petitioner Harte-Hanks Communications, Inc.,* publisher of the Hamilton, Ohio *Journal News* (collectively the "*Journal News*"), respectfully submits this Reply Brief in response to the Brief of Respondent Daniel Connaughton. As the following discussion demonstrates, Connaughton has failed to confront either the undisputed record evidence or the well-settled principles of constitutional law that mandate reversal of the judgment below.

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* The corporate listing statement required by S. Ct. R. 28.1 and included in the Brief of Petitioner remains currently accurate and reference is made thereto.

I. THE JUDGMENT BELOW CANNOT BE AFFIRMED UNDER ANY STANDARD OF APPELLATE REVIEW.

Respondent Daniel Connaughton's brief in this Court is remarkable largely for what it omits—any serious discussion of Connaughton's prepublication, tape-recorded interview with the *Journal News*—and for what it relies upon—a demonstrably incorrect construction of one sentence wrenched from the deposition testimony of the newspaper's attorney. Connaughton's inability even to address the undisputed evidence that, prior to publication, he "confirmed the factual basis" of the article at issue, App. 58a (Guy, J., dissenting),[1] belies his claim that the record contains "clear and convincing" evidence of "actual malice."[2]

Like the Court of Appeals majority, Connaughton both dismisses his prepublication statements to the *Journal News* as "speculation" and avoids any reference to the text of the tape-recorded interview in which he made them. Brief of Respondent, at 33.[3] Yet, this evidence of

[1] References to the Joint Appendix are denoted as "J.A."; references to the trial record are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "App.".

[2] In its opening brief, the *Journal News* sets out a detailed rendition of the trial record, based upon both (1) the undisputed evidence and (2) the resolution of conflicting testimony in favor of the jury's verdict. *See* Brief of Petitioner, at 1-12. Moreover, the *Journal News' Statement of the Case* contains explicit references to those portions of the trial record on which it is based. Connaughton, in contrast, provides this Court with a manufactured account that is, not surprisingly, largely bereft of references to the record. *See* Brief of Respondent, at 1-2, 20-30.

[3] Similarly, Connaughton's brief declines to address a host of other undisputed evidence, including (1) his post-publication press conference at which he again confirmed the factual bases of the article at issue, *see* J.A. 245, (2) his wife's independent confirmation of material portions of the article, *see* J.A. 98, 116, and (3) prosecutor John Holcomb's endorsement to the *Journal News* of Alice Thompson's credibility prior to publication, *see* J.A. 47, 146-47.

Connaughton's own statements, which requires no resolution of conflicting testimony or weighing of witness credibility, demonstrates beyond peradventure that the *Journal News* had ample reason to conclude that Alice Thompson's allegations had a substantial basis in fact. Although the *Journal News* could not "conclusively determine whether Ms. Thompson was justified in construing the plaintiff's statements as 'promises,'" App. 58a (Guy, J., dissenting), Connaughton's prepublication admissions surely preclude a finding that the *Journal News* reported Thompson's statements with the requisite "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In contrast to this undisputed evidence, the self-styled "direct" proof of "actual malice" marshalled by Connaughton is attorney James Irwin's "remarkable concession" that the *Journal News*' "editorial decision-makers told him that Thompson simply misinterpreted what Connaughton said to her." Brief of Respondent, at 9, 12, 19. Irwin's *actual* testimony on this point speaks for itself:

> Q. What if anything was the most important factor in your rendering the advice that you did to the Journal News?
>
> A. That Alice Thompson's claims seemed to make sense and that Dan Connaughton's interview confirmed all those basic facts, leaving only a question of interpretation for the readers of the article.
>
> * * * *
>
> Q. [At your deposition, did] I ask you this? "You weren't told at that time that Dan Connaughton flat denied he made any offers or inducements to either one of those women?" I asked you that question, didn't I?
>
> A. I have no distinct recollection, but it's here and I'm sure you did.

> Q. Did you give this answer? "I was told as we went over this line-by-line that Dan Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips."
>
> A. Yes sir.
>
> * * * *
>
> [A.] "This young lady, as I was given to believe, is just barely hanging on the economic margin of society, being driven up to [his] home in his Mercedes or his Buick to a hundred thousand dollar plus home, she said he talked to her about these things. She thought he was offering her something. He confirmed all that. He said, quote, she misinterpreted it, close quote."

J.A. 192, 196-98. At worst, Irwin's "remarkable concession" that he "was told . . . Connaughton did deny making any offers and that she misinterpreted his comments and discussions about the jobs and trips," J.A. 196, demonstrates an incorrect choice of grammar. It does not, as Connaughton would contend, divulge "the *Journal News*' admitted prepublication belief that Thompson simply misinterpreted what Connaughton said to her." Brief of Respondent, at 15.

The "actual malice" standard is designed to ensure constitutional protection for all expression about candidates for public office, save only the calculated falsehood. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Because it cannot be disputed that, prior to publication, Connaughton himself confirmed the factual bases of the article at issue, a finding of "actual malice" cannot be affirmed under *any* standard of appellate review, much less the searching, *de novo* review demanded by the First Amendment.

II. INDEPENDENT REVIEW BY APPELLATE COURTS IS NEITHER "PRACTICALLY INFEASIBLE" NOR "CONSTITUTIONALLY TROUBLESOME."

As his principal legal argument, Connaughton asks this Court either to "abandon" the requirement of independent appellate review altogether or to restrict it to the so-called "ultimate" finding of "actual malice" identified by the Court of Appeals. Brief of Respondent, at 4. According to Connaughton, independent review, at least as "expanded" in *Bose Corp. v. Consumers Union*, is both "practically infeasible," because it requires appellate courts to make findings about the "'*mens rea* of an author,'" and "constitutionally troublesome," because it "eviscerate[s] the role of the jury" in violation of the Seventh Amendment. Brief of Respondent, at 4, 5, 7 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 515 (1984) (Rehnquist, J., dissenting)). Neither contention survives analysis.

Initially, Connaughton incorrectly suggests that independent review is a recent invention, mentioned only in passing in *New York Times*, and somehow "expanded" to impractical and unconstitutional dimensions in *Bose*. Brief of Respondent, at 4. To the contrary, the doctrine of independent review, especially in the First Amendment context, enjoys a long and venerable history, dating at least from this Court's 1927 decision in *Fiske v. Kansas*, 274 U.S. 380 (1927), only two years following the "incorporation" of the First Amendment into the Fourteenth in *Gitlow v. New York*, 268 U.S. 652 (1925). Independent review has been a fixture of this Court's First Amendment jurisprudence since that time whenever an appellate court is called upon to determine cases of "alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legiti-

mately be regulated.'" *New York Times Co. v. Sullivan*, 376 U.S. at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)).[4]

For more than sixty years, the doctrine of independent review has required that appellate courts undertake a *de novo* analysis of material facts to determine, *inter alia*, whether allegedly obscene expression appeals to the "prurient interest" in a "patently offensive" way, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); whether a newspaper editorial creates "a clear and present danger" to the administration of justice, *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946); or whether a speaker's pronouncements, under the circumstances, threaten to disturb the peace, *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). This Court's decisions with respect to all these inquiries, as well as the search for calculated falsehood demanded by *New York Times* and *Bose*, have long been premised on the constitutional "obligation" of judges "to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and, in doing so . . . mak[e] an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).[5]

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[4] *See* Brief of Petitioner, at 21 n.29 (citing cases); *Bose Corp. v. Consumers Union*, 466 U.S. at 505 (Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited").

[5] In *New York Times*, no less than in *Bose*, this Court undertook a searching, *de novo* review of the whole record to determine whether the plaintiff had proven "actual malice" with "convincing clarity." 376 U.S. at 285-86; *see Bose Corp. v. Consumers Union*, 466 U.S. at 518 n.2 (Rehnquist, J., dissenting) ("[I]n *New York Times* . . . we conducted independent appellate review of the facts

The independent review of the record undertaken by this Court in *New York Times* and *Bose* is no more difficult or less necessary than that routinely required in other First Amendment cases. As the *Journal News*' opening brief demonstrates, it is not only a "feasible," but a relatively unimposing, exercise for an appellate court to review the trial evidence, identify the undisputed material facts, resolve disputed issues of material fact in favor of the jury's verdict, and determine, by invoking its independent judgment, whether that record contains clear and convincing proof of "actual malice." *See* Brief of Petitioner, at 2-12. Although the search for calculated falsehood concededly speaks in part to the *mens rea* of the defendant, *see Bose Corp. v. Consumers Union*, 466 U.S. at 515 (Rehnquist, J., dissenting), the evidence surrounding that determination is largely circumstantial, *see Herbert v. Lando*, 441 U.S. 153, 170 (1979), and no different from that routinely considered by appellate courts when undertaking independent review in a variety of other contexts, *see, e.g., Miller v. Fenton*, 474 U.S. 104, 112 (1985) (Court required to determine whether confession was "voluntary"); *Baumgartner v. United States*, 322 U.S. 665, 666 (1944) (Court required to ascertain whether citizen subjectively

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underlying the 'actual malice' determination."). As this Court reaffirmed in *New York Times*, when the issue for decision is whether particular expression is protected by the First Amendment, appellate judges must "'examine . . . the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" 376 U.S. at 285 (quoting *Pennekamp v. Florida*, 328 U.S. at 331). Although that inquiry may involve the consideration of specific facts, the Court in *New York Times* recognized that the Constitution empowers appellate judges to "'review the finding of facts . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" 376 U.S. at 285 n.26 (quoting *Fiske v. Kansas*, 274 U.S. at 385-86).

renounced allegiance to Germany).[6] Most importantly, however, the "actual malice" determination calls upon appellate courts to make a uniquely *judicial* decision—whether the expression at issue has forfeited its claim to constitutional protection. That a court must examine the trial record in making that judgment does not dilute its essentially constitutional, and hence judicial, character.[7]

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[6] As Justice Black noted in articulating the constitutional necessity of independent review:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. . . . [I]t is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made."

Feiner v. New York, 340 U.S. 315, 322 n.4 (1951) (Black, J., dissenting) (quoting *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935)).

[7] *See Bose Corp. v. Consumers Union*, 466 U.S. at 506 n.25 ("actual malice" determination " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind' ") (quoting *Roth v. United States*, 354 U.S. 476, 498 (1957)) (emphasis in original). Connaughton's suggestion that limiting independent review to the so-called "ultimate" finding of "actual malice" somehow renders such review more "practically feasible," Brief of Respondent, at 5, makes no sense. The exercise in "ritualistic inference granting," *Tavoulareas v. Piro*, 759 F.2d 90, 147 (Wright, J., dissenting in part), *vacated en banc*, 763 F.2d 1472 (D.C. Cir. 1985), mandated by such an analysis is no less time-consuming or more manageable than the *de novo* review envisioned by *New York Times* and *Bose*. Indeed, by requiring appellate courts to ignore even undisputed evidence supporting the defendant and by compelling them to draw all conceivable inferences favoring the plaintiff, the notion of independent review embraced by Connaughton and the Court of Appeals is, ultimately, a charade that results in a finding of "actual malice" in *every* case. Where, as in adjudicating the "actual malice" issue, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," this Court has repeatedly indicated that it cannot "give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 474 U.S. at 114.

Accordingly, in *New York Times* and again in *Bose*, this Court has rejected the suggestion that independent appellate review somehow "eviscerate[s] the role of the jury," Brief of Respondent, at 5, in contravention of the Seventh Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26; *Bose Corp. v. Consumers Union*, 466 U.S. at 508 n.27. Independent review extends only to the constitutionally derived "actual malice" determination and does not contemplate *de novo* appellate scrutiny of the myriad of other issues typically submitted to a jury in defamation litigation. *See id.* at 514 n.31. Indeed, by requiring appellate courts to resolve disputed issues of material fact in favor of a jury's finding of "actual malice," the doctrine of independent review both respects the jury's salutary role in assessing witness credibility and preserves the distinct duty of appellate courts to determine "whether governing rules of federal law have been properly applied to the facts." *New York Times Co. v. Sullivan*, 376 U.S. at 285 n.26.[8]

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[8] By its own terms, the Seventh Amendment speaks to the historical tradition manifested in the common law and its modern analogues. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449 (1977); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-40 (1979) (Rehnquist, J., dissenting) ("[T]he scope and effect of the Seventh Amendment, . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted."). "Actual malice," by contrast, is a creature of constitutional origin that simply has no ancestor at common law, where the Crown retained unbridled power to punish seditious libel and its courts were not called upon to safeguard criticism of public officials, much less candidates for public office. *See* Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1059 (1962). Indeed, the common law courts continued the view of the Star Chamber that *all* criticism of government and public officials was necessarily false, and the sanctions for publishing libelous falsehood were almost exclusively criminal. *See id.* at 1059-61. The jury had no role to play at all until the passage of Fox's Libel Act,

This Court has long recognized that the line separating protected from unprotected expression is a more difficult, "sensitive" line to draw than that separating, as in typical civil litigation, permissible from impermissible conduct. *Speiser v. Randall*, 357 U.S. at 525. Thus, *New York Times* proceeds from the premise that, while juries may be perfectly capable of distinguishing negligent from responsible driving, the First Amendment simply does not trust them to distinguish protected from unprotected expression.[9] Such issues of constitutional line-drawing are "inherently unsusceptible to accurate resolution by a jury," *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*,

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32 Geo. 3, c. 60 (1792), one year after the Seventh Amendment was ratified, in an effort to *protect* free political expression. *Id.* Under Fox's Libel Act, the jury's role was essentially a "right to acquit" in criminal cases and the common law courts retained the acknowledged and widely championed power to override a jury's judgment of conviction. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 328 (1966). It is "murky logic indeed that would derive from a one-sided rule in the application of criminal sanctions an uncontrolled right to find for either side in civil cases" grounded in the Seventh Amendment. *Id.* at 327. The "central meaning" of the First Amendment identified in *New York Times*—*i.e.*, the unconstitutionality of the law of seditious libel itself—is stood on its head when Fox's Libel Act, Britain's own modest effort to safeguard political expression, and the Seventh Amendment are invoked by a would-be public official to bar meaningful judicial review of a jury finding that penalizes criticism of his conduct.

[9] *See Bose Corp. v. Consumers Union*, 466 U.S. at 501 n.17 ("stakes" involved in the "actual malice" determination—"in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact"); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").

471 U.S. 1127 (1985), and must ultimately be subject to appellate scrutiny.

In the last analysis, therefore, Connaughton's legal arguments fail because they attempt to separate two inextricably linked and mutually dependent safeguards of constitutional magnitude—the "actual malice" standard and the rule of independent appellate review. Independent review represents no more than a reflection of the constitutional principle that, in the First Amendment context, "[t]he *procedures* by which the facts of the case are determined assume an importance fully as great as the validity of the *substantive* rule of law to be applied." *Speiser v. Randall*, 357 U.S. at 520 (emphasis added). The efficacy of the "actual malice" standard depends on the ultimate power of appellate judges to apply it in specific cases and thereby to define that category of expression beyond the scope of constitutional protection. Absent independent appellate review, "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding inherent in all litigation will create the danger that legitimate utterance will be penalized," *id.* at 526, a danger the First Amendment cannot tolerate.

III. CONNAUGHTON MISCONSTRUES THE "ACTUAL MALICE" STANDARD AND MISAPPLIES IT TO THE RECORD EVIDENCE.

Connaughton's rejection of the doctrine of independent review is particularly troublesome when coupled with his erroneous explication of the "actual malice" standard itself. Indeed, by rejecting this Court's repeated admonitions that the "actual malice" standard is not designed to root out and punish instances of journalistic malpractice, but rather to identify that narrow category of libelous falsehood beyond the scope of First Amendment protection, Connaughton also misapplies the constitutionally mandated standard to the record evidence.

A. Connaughton Misconstrues the "Actual Malice" Standard.

Like the Court of Appeals, Connaughton erroneously equates "actual malice" with the journalistic malpractice standard advocated by a plurality of this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), but rejected by the Court's majority in that very case and consistently thereafter, *see* Brief of Petitioner, at 24 n.32; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). Connaughton equates " 'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers' " with "actual malice," Brief of Respondent, at 31-32 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. at 158), chides the *Journal News* for not following "good practice[s]," Brief of Respondent, at 25, and purports to instruct the newspaper regarding the dictates of "responsible journalism," *id.*, at 26. Connaughton's views regarding "good" or "responsible" journalism are, however, constitutionally irrelevant to this proceeding.

Courts "do not sit, even in reviewing a libel verdict, as some kind of journalism review seminar, offering [their] observations on contemporary journalism and journalists." *Tavoulareas v. Piro*, 759 F.2d at 145 (Wright, J., dissenting in part). As this Court has repeatedly emphasized, "actual malice" "is not measured by whether a reasonably prudent man would have published." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *accord Gertz v. Robert Welch, Inc.*, 418 U.S. at 334 n.6. Rather, the plaintiff must demonstrate that the defendant published despite a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

The application of a journalistic malpractice standard is particularly inappropriate in this case, which involves expression at the core of the First Amendment. The

"application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). Indeed, "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it." *Id.*

Connaughton's erroneous construction of the "actual malice" standard infects his entire analysis of the record evidence. Most significantly, Connaughton contends that the record contains "direct evidence of actual malice" because (1) *Journal News* reporter Pam "Long simply did not know whether or not Thompson's accusations against Connaughton were true when she wrote the story," and (2) Editorial Director Jim Blount "conceded . . . that 'there is no judgment on our part as to who was telling the truth.' " Brief of Respondent, at 19 (quoting R. 638). According to Connaughton, these "admissions were made in unguarded candor" and thus "should be given extraordinary weight." *Id.*

That Connaughton not only credits, but seeks to emphasize this undisputed testimony demonstrates his fundamental misconception of the applicable law. The "actual malice" standard requires "clear and convincing" proof that "the defendant *in fact* entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731 (emphasis added); *see Garrison v. Louisiana*, 379 U.S. at 75 (only "calculated falsehood" beyond scope of First Amendment protection). "Actual malice" is knowing or believing that a defamatory statement is probably false; its refutation does not require an affirmative belief that such expression is true. Since Connaughton concedes that the *Journal News* "simply did not know" whether Thompson's charges were true or false, Brief of Respondent, at 19, it cannot be found to have published them with a "high degree of awareness of

their probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

If Connaughton's views regarding the contours of "actual malice" were accepted, much news reporting about political campaigns heretofore presumed to be constitutionally protected would be subject to civil penalties. In the instant case, the electorate was entitled to be informed about Thompson's statements concerning the genesis of her impending grand jury testimony against Connaughton's opponent, especially after Connaughton confirmed their factual bases. As this Court has recognized, "a vast amount of what is published in the daily . . . press purports to be descriptive of what somebody *said* rather than of what anybody *did*." *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971) (emphasis in original). If a newspaper is compelled to warrant the accuracy of otherwise newsworthy statements made in the course of a highly charged campaign for public office, it will " 'steer far wider of the unlawful zone,' " and the voters will be deprived of much information "because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co. v. Sullivan*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526).

B. Connaughton's Analysis Distorts Both the Record Evidence and Its Legal Significance.

Connaughton's discussion of the "actual malice" issue is not restricted to a misconstruction of the substantive standard itself. By supplementing the actual trial record with nonexistent "evidence" and by crediting insupportable inferences from that manufactured record, Connaughton also distorts the legal significance of even those "findings" that he presumes the jury "could have" made. App. 35a-36a.

According to Connaughton, the trial record "overflow[s]" with "circumstantial" proof of "actual malice," Brief of Respondent, at 8, 20, including, *inter alia*, "evidence" that:

—the *Journal News* "consciously avoided pursuing clearly available means of making absolutely certain that Thompson's statements were false," *id.*, at 2, such as reviewing the tape recordings of the September 17 meeting at Connaughton's home, interviewing Patsy Stephens, and confirming Thompson's credibility with Hamilton police, *id.*, at 24-29;

—the *Journal News* was aware that Thompson "had a history of psychiatric illness," had been convicted of "a crime of deception," and had "an admitted motive to fabricate," *id.*, at 2; and

—the *Journal News* had a "confidential personal relationship" with Judge Dolan and a vendetta against the *Cincinnati Enquirer* that led it to publish the article at issue to "reestablish" itself "as the dominant news force in Hamilton politics" and to "revive" Judge Dolan's "sagging campaign," *id.*, at 2, 41.

Neither the record nor the applicable law supports Connaughton's assertions.

The undisputed evidence reveals, for example, that the tape recordings of the September 17 meeting are of dubious, if any, relevance because they *omit* nearly two hours of that all-night session; in any event, Connaughton and his wife had *several* additional meetings and conversations with Thompson prior to either her interview with the *Journal News* or her grand jury testimony. *See* J.A. 114-15, 134, 165; R. 184-85, 352, 448-49, 454.[10] Moreover,

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[10] Connaughton similarly distorts the record with respect to the *Journal News*' efforts to contact Stephens. For example, Connaughton notes that, following publication of the article at issue, "Long cancelled an interview requested by Stephens." Brief of Respondent, at 40. It is undisputed, however, that Long cancelled the interview because she had to pick up her daughter, who was ill, from school; that Stephens then refused to reschedule the interview; and that Stephens promised to telephone Long the following day but never did so. R. 777. Moreover, Stephens' actual testimony con-

the record contains undisputed evidence that Blount verified Thompson's credibility both with local police *and* with Hamilton prosecutor John Holcomb prior to publication, and that both Holcomb and Officer James Schmitz confirmed these views about Thompson at trial. J.A. 38, 47, 146-47, 185-86.[11]

The record further reveals that Thompson's "crime of deception" was a misdemeanor shoplifting violation and that the only mention of Thompson's purported "history of psychiatric illness" prior to publication was Connaughton's own suggestion that she may have been to a local psychiatric hospital, an assertion he concededly could not "back . . . up." J.A. 190, 273, 277.[12] Similarly, Connaughton's assertion that Blount had a "confidential personal relationship" with Judge Dolan is based on one, unremarkable meeting between the newspaper's editorial director and a political candidate, and is rebutted by the uncontradicted testimony of both Blount and Judge Dolan. J.A. 18, 205; R. 53-54, 582.[13] Finally, Connaughton's "evidence" of the *Journal News'* "deceptive stratagem to undermine the *Enquirer's* market share in the Hamilton area," Brief of Respondent, at 42, consists solely of Blount's published observations in a single column concerning the *Enquirer*'s placement of an article about Judge Dolan [14] and his innocuous "admission" that the two newspapers compete for news, *id.*, at 42-43.[15]

firmed that Connaughton *did* discuss with her and Thompson the subjects of jobs, anonymity, a vacation trip, and his plans to confront Judge Dolan. J.A. 326; R. 180-81, 186-89, 790.

[11] Despite this undisputed evidence, Connaughton nevertheless asserts that "Blount told two diametrically opposite stories" in his deposition and trial testimony about his efforts to confirm Thompson's credibility. Brief of Respondent, at 28. To the contrary, in his deposition and again at trial, Blount testified that he directed reporter Tom Grant to verify with Hamilton police that Thompson informed them of her allegations, but that Grant was unable to do so. J.A. 37-39. Even if the jury believed that Blount had "dissembled" about his conversations with Grant, Brief of Respondent, at 29, such a conclusion cannot support an inference of "actual malice" on this record. *See Bose Corp. v. Consumers Union*, 466 U.S. at 498, 512 ("Even though the District Court found it impossible to believe that [the author]—at the time of trial—was truthfully maintaining" that "the word 'about' meant 'across,'" such testimony merely displays the author's "capacity for rationalization;" it "does not establish that he realized the inaccuracy at the time of publication.").

[12] Ultimately, Connaughton's evidence that Thompson had an "admitted motive to fabricate" can be reduced to her statement that she did not want to be viewed as a "snitch" for talking to Connaughton in the first place. Brief of Respondent, at 2. As Connaughton himself concedes, however, it is difficult to understand why Thompson would believe that it would improve her "reputation to have people think she had made these statements in return for a consideration." *Id.*, at 21.

[13] A review of the trial testimony concerning Blount's session with Judge Dolan simply reveals no evidence either that Blount "advised Dolan how to handle . . . negative publicity," Brief of Respondent, at 41, or that "Dolan told Blount that the *Cincinnati Enquirer* had been investigating claims that [Billy New] had been accepting bribes for fixing cases" and that this "inquiry was beginning to focus on Dolan directly," *id.*, at 20. In fact, the *Enquirer*'s investigation and subsequent article focused on an entirely different issue, Judge Dolan's allegedly unconstitutional disposition of criminal cases in chambers. J.A. 212; R. 53-55.

[14] Like the Court of Appeals majority, Connaughton belabors one reference in Blount's October 31 column to an "*unproven* suggestion that the Connaughton forces have a wealthy, influential link to *Enquirer* decision-makers." J.A. 210 (emphasis added). It is, however, undisputed that such a rumor, which Blount expressly identified as unproven in his column, *was* circulating widely in the community, J.A. 22-25, a fact that was necessarily relevant to Blount's discussion of public reaction, whether valid or not, to the increasing bitterness of the Connaughton-Dolan campaign.

[15] Although Connaughton, like the Court of Appeals, devotes precious little discussion to the actual text of the article at issue, he does assert that "the devastating direct quotes which appeared in the November 1 story—'in appreciation' for and 'dirty tricks'—cannot be found in the transcript of Thompson's taped interview on October 27." Brief of Respondent, at 40. It is, however, undisputed that every person present at her October 27 interview with the

From this "evidence," both real and manufactured, Connaughton suggests that a reviewing court is obligated to draw the inference that the *Journal News* published the article at issue with "actual malice." Yet, this Court has repeatedly emphasized not only that failure "to make a prior investigation" cannot constitute "proof sufficient to present a jury question" in a case governed by the "actual malice" standard, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (per curiam); *accord St. Amant v. Thompson*, 390 U.S. at 730, but also that even an acknowledged bias, "bad motive," or "intent to inflict harm" is, at best, only tenuously probative of "actual malice," *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 881 (1988); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam). In the instant case, the chain of inferences from this already tenuous evidence that would be necessary to sustain the jury's finding of "actual malice" is convincingly broken by one piece of evidence that cannot be controverted—Connaughton's tape-recorded concessions that the subjects of jobs, trips, anonymity, and vacations, as well as his plan to confront Judge Dolan, *were* discussed by the Connaughtons with Thompson.

This undisputed evidence precludes any suggestion that the record contains "clear and convincing" proof of "actual malice." Even if Connaughton's "circumstantial" evidence were otherwise probative of "actual malice," it

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Journal News, including Thompson herself, testified at trial that she used the term "dirty tricks" prior to the tape-recorded portion of the conversation. J.A. 157, 162-63; R. 554-55, 596-97, 674, 729. Even during the recorded portion of the interview, Thompson used the words "dirty" and "tricked" in describing Connaughton's conduct. J.A. 280, 314. Moreover, the terms "dirty tricks" and "in appreciation" are certainly fair characterizations of Thompson's specific allegations. J.A. 162; *see Time, Inc. v. Pape*, 401 U.S. at 289-90.

must give way to the far more plausible inferences that, *inter alia*, (1) the *Journal News* deemed it manifestly unnecessary to listen to the tapes of portions of the September 17 meeting or to seek further confirmation of Thompson's statements from Stephens once Connaughton admitted their factual bases, and (2) any questions about Thompson's credibility or motives were rendered irrelevant by Connaughton's own statements.[16] Thus, the *only* reasonable conclusion that can be drawn from the record is that the *Journal News* published the article at issue without the requisite "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. at 74.

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[16] *See St. Amant v. Thompson*, 390 U.S. at 733 (reliance on source with obvious bias does not demonstrate "actual malice" when defendant "verified other aspects" of the source's allegations).

CONCLUSION

An independent review of the trial record inevitably requires a finding that the expression at issue is protected by the First Amendment. Indeed, the *Journal News* was simply "performing its wholly legitimate function as a community newspaper when it published full reports" of both Thompson's charges and Connaughton's responses, both of which bore directly upon his qualifications for the public office he sought. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). Accordingly, the *Journal News* respectfully requests that the judgment below be reversed and that the case be dismissed.

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